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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-123 and 71-198

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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INDEX

	Page
STATEMENT OF INTEREST OF THE AMICUS	1
I. Summary of Argument	3
II. Argument	4
A. The National Labor Relations Act is designed to protect freedom of choice by employees as to the question of Union representation	4
B. Burns was not a "successor employer" within the framework of the statutory scheme	6
1. The Labor Board here has departed from the correct test in cases involving changes of ownership resulting in alteration of the work group	6
2. The character and structure of the work group was substantially altered as a result of the change from Wackenhut to Burns	9
C. Even assuming arguendo that Burns was a successor employer, it should not have its predecessor's labor agreement unwillingly imposed upon it	12
1. The statute does not confer authority upon the Board to compel the making of labor agreements	12
2. The Board's own genealogy is inconsistent with its view of the statute here	17
3. This Court's decision in the Wiley case does not support the Board's position here	18
4. The desirable approach, and as Congress intended, is to permit the Union and a successor employer freedom to negotiate their own collective bargaining agreement	20
III. Conclusion	24

TABLE OF AUTHORITIES CITED

A. Cases:

	Page
Boy's Market v. *Retail Clerks Union Local 770*, 398 US 235 (1970)	21-22
Burns International Detective Agency, 182 NLRB No. 50, 74 LRRM 1098 (1970)	20
Chicago and Northwestern Ry. Co. v. *United Transportation Union*, 402 US 570 (1971)	15
Ellary Lace Corp., 178 NLRB No. 11, 72 LRRM 1063 (1969)	8
Emerald Maintenance, Inc., 188 NLRB No. 139, 76 LRRM 1437 (1971)	21, 23
Ex-Cell-O Corporation, 185 NLRB No. 20, 74 LRRM 1740 (1970)	15
Garment Workers Union v. *NLRB*, 366 US 731 (1961)	5
Garwin v. *NLRB* (CA DC) 374 F.2d 295 (1969)	5
General Extrusion Co., 121 NLRB 1165 (1958)	17
Glen Goulding d/b/a Fed-Mart, 165 NLRB 202 (1967)	17
H. J. Heinz Co. v. *Labor Board*, 311 US 514, (1940)	14
H. K. Porter Co., Inc. v. *National Labor Relations Board*, 397 US 99 (1970)	3, 14, 16
Hackney Iron & Steel Co., 167 NLRB 613 (1967)	17-18
Interstate 65 Corp., 186 NLRB No. 41, 75 LRRM 1403 (1970)	23
J. I. Case Co. v. *Labor Board*, 321 US 332 (1944)	5, 10
John Wiley and Sons v. *Livingston*, 376 US 543, (1964)	5, 18
Jolly Giant Lumber Co., 114 NLRB 413 (1955)	17
Juneau Spruce Corp., 82 NLRB 650 (1949)	17
K.B. & J. Young's Supermarket, Inc., 157 NLRB 271 (1966)	17
Lincoln Private Police, 189 NLRB No. 103, 76 LRRM 1437 (1971)	11, 22
Michaud Bus Lines, Inc., 171 NLRB No. 21, 68 LRRM 1033 (1968)	18
National Labor Relations Board v. *American National Insurance Co.*, 343 US 395 (1952)	13

Page

National Labor Relations Board v. *Jones and Laughlin Steel Corp.*, 301 US 1 (1937) 12
National Labor Relations Board v. *Stepp's Friendly Ford* (CA 9) 338 F.2d 833 (1964) 8
National Labor Relations Board v. *Strong*, 393 US 357 (1969) 13, 14
Norfolk and Western Ry. Co. v. *Nemitz*, —— US ——, 78 LRRM 2721 (1971) 15, 16
Northwest Galvanizing Co., 168 NLRB 26 (1967) 8
Printing Pressman v. *Pride Papers Corp.*, 445 F.2d 361 (1971), cert. den'd —— US ——, Dec. 20, 1971 18
Ranch-Way, Inc., 183 NLRB No. 116, 74 LRRM 1389 (1970), aff'd (CA 10) 445 F.2d 625 (1971), cert. pending (Docket No. 71-589) 7
Rohlik, Inc., 145 NLRB 1236 (1964) 17
Tallakson Ford, Inc., 171 NLRB No. 67, 68 LRRM 1136 (1968) 8
Terminal Assn. v. *Trainmen*, 318 US 1 (1942) 15
Thomas Cadillac, Inc., 170 NLRB No. 92, 67 LRRM 1504 (1968), aff'd as modified (CA DC) 414 F.2d 1135 (1969) 7
Travelodge Corp., 182 NLRB No. 52, 74 LRRM 1105 (1970) 11
Triangle Maintenance Corp., 194 NLRB No. 85, 78 LRRM 1696 12
Tri-State Maintenance Corp. (CA DC) 408 F.2d 171 (1968) 10
Triumph Sales, Inc., 154 NLRB 916 (1965) 17

B. Statutes:

National Labor Relations Act, as amended

Sec. 7, 29 U.S.C. 157 5
Sec. 8(d), 29 U.S.C. 158(d) 13

C. Miscellaneous:

H. R. Rep. No. 245, 80th Cong., 1st Session 19-20 (1947) 13
The Developing Labor Law, Morris, C.J. Ed. pp. 40, 275 ..... 4, 13

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and in-

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* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42 (2).

dividuals. It is the largest association of business and professional organizations in the United States.

The issues in the present case—the nature and extent of changes in ownership along with the character and structure of a work group and their impact upon employees, employers, labor organizations and collective bargaining agreements under the National Labor Relations Act, are matters of significant concern in the modern business world.

Although less than twenty five percent (25%) of the work force in the country is represented by labor unions, a large number of these employees are in industries that have a substantial impact upon the national economy. The ever increasing pressure of economic competition has brought with it the judgment of the marketplace requiring the American businessman, both large and small, to exert greater efforts to maintain a healthy and vibrant existence and thus contribute to the overall economic well-being of the nation and its future growth.

The considerations involved in the change of ownership of a business are many and varied. The economic reasons for such changes are equally so. It is essential to the well-being of the American business community that the free flow of economic forces be permitted to operate so as to enable both the healthy business enterprise to prosper, and the ailing one to be rehabilitated.

This case presents the Court with the prospect of reviewing guidelines for the national labor policy which should in large measure, also reflect, the tenuous nature of the contemporary struggle for economic survival. It is the purpose of this brief to focus the Court's attention upon the issues within the parameters of the larger framework of the national business scene and the dual interplay of the national labor and economic policies.

Accordingly, the interest of the National Chamber in the outcome of this litigation is vital and it submits this brief as *amicus curiae*, urging this Court to delineate the

appropriate guidelines in cases of this nature.* The Court's decision here will have consequences reaching far beyond the confines of this dispute, not only for the American business community, but for the nation as well.

I. SUMMARY OF ARGUMENT

A *bona fide* change of ownership of a business enterprise whether because of a sale, merger or other similar type of occurrence, by its very nature, results in a change in the business and to contend that things continue unchanged is to ignore the realities of life.

Likewise, the employees working for such enterprise will find that the circumstances surrounding their employment are also changed. Where the work group has formerly functioned under collective bargaining, there may also be changes, but in varying degrees. To what extent the change of ownership will effect an alteration in the character and structure of the work group is a complex question and the one of primary concern in this appeal.

The National Labor Relations Act guarantees employees freedom of choice as to whether or not they wish to have union representation. Where there is a change in ownership absent unfair labor practices, it should be incumbent upon the Board to consider the change in conditions in light of the statutory rights of the employees. In such instances contrary to the Board's holding in this case, there is no statutory mandate automatically requiring a new or successor employer to bargain with the certified or recognized labor organization unless it is the freely chosen majority representative designated by the employees in the altered work group under a Board conducted election.

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* The Chamber's interest in this case is an extension of its previous concern expressed as an *amicus* in *H. K. Porter Co.; Inc.* v. *NLRB*, 397 US 99 (1970) where the contention urged by the NLRB here was rejected.

The Labor Board here, as well as at various times in other recent decisions, has failed to give due recognition to the intent of Congress and misconceived the proper test to balance the statutory rights of employees, the recognized and necessary interests of employers, and the legitimate goals of labor organizations. The instant case is one such example where it has not only ignored the lack of evidence of any business "relationship" between Wackenhut and Burns, but also the substantial alteration in the character and nature of the work group as a result of the transition between companies and then applied an inflexible and unrealistic design upon the persons involved.

Finally, even if this Court should be inclined to hold otherwise, both the letter and the spirit of the Act clearly spell out the intent of Congress to leave collective bargaining to the parties and for government not to interfere. Thus, even the successor employer should be free to negotiate a contract, based upon its own operational requirements and should not be forced to conduct the business within the confines of an agreement arrived at by another party with perhaps substantially different views on how to conduct such business enterprise.

II. ARGUMENT

A. The National Labor Relations Act is designed to protect the freedom of choice of employees as to the question of Union representation.

As Section 7 of the Act makes clear, Congress intended that employees would have the freedom to decide whether they would or would not be represented by a labor organization of their own choosing.[1]

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[1] This is self-evident from the 1947 statutory amendment "to give employees the right to *refrain* from engaging in activities protected in the original Section 7." *The Developing Labor Law*, Morris, C. J. Ed., p. 40.

> "Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing . . . *and shall also have the right to refrain from any or all such activities* . . ." 29 U.S.C. 157 (emphasis supplied).

The Board is invested by Congress with the responsibility for protecting these employee rights and to insure the freedom of choice and majority rule guaranteed under the Act to accept or reject collective bargaining. *J. I. Case Co.* v. *Labor Board* 321 US 332, 339 (1944). While the right of workers to choose a Union representative is one of the keystones of our national labor policy, the Act no less equally protects the right of such workers to have none. *Garwin* v. *NLRB* (CA DC), 374 F. 2d 295 (1969). Further, the statutory design is insulated from attack regardless of the quarter from which it springs. *Garment Workers Union* v. *NLRB* 366 US 731 (1961).

While the foregoing principles are well established, their applicability in cases involving changes of ownership and/or concomitant changes in the character and structure of a work group are not so settled.

The Board however would have this court believe contrariwise and that the question of when and under what circumstances an employer must recognize and bargain with a union, in the face of a change of ownership, is not in doubt. This Court, however, has never faced the question and has in fact expressly declined to do so in a previous case.

> "In addition, we do not suggest any view or questions surrounding a certified union's claim to continued representative status following a change in ownership." *John Wiley and Sons* v. *Livingston*, 376 US 543, 551 (1964).

Thus it is presented with its first real opportunity to examine the issues involved here.

B. Burns was not a "successor employer" within the framework of the statutory scheme.

In the area of "successorship", the Board has, without this Court ever passing on the question, subordinated the rights of employees to the institutional interests of labor organizations. Its decisions are hardly models of consistency, and raise serious questions of whether the policies of the Act are being effectuated. It is submitted that this case is the proper vehicle for the Court to review the existing dichotomy and establish guidelines for this area of the law consistent with the purposes of the Act.

1. ***The Labor Board here has departed from the correct test in cases involving changes of ownership resulting in the alteration of the work group.***

The establishment of a successorship doctrine that correctly merges the national labor policy and the national economic policy is not an easy task. Neither area should be accorded the type of weight which distorts the end result. There are instances where the proper conclusion is that a change of ownership has not effected any *real* change in the nature and structure of the work group and the application of a successorship doctrine is appropriate.[2]

The Board, and on less frequent occasions, the Courts of Appeal have tended to misunderstand the nature of the changes that have actually taken place by a change in ownership—not in the business sense—but as they affect the group of workers employed—and thus subject to potential collective bargaining rights under Section 9 (a) of the Act.

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[2] Thus, as in the situation, where Company A purchases the entire business of Company B as a going business, and continues to operate it as a going business without in fact any real change in the character or structure of the work group at Company B the certified or lawfully recognized union should be permitted to continue to enjoy its status. Such a conclusion makes clear sense in that it effectuates the choice of the employees within a setting that has not in any *real* sense changed as to the work group.

We submit that where the framework of the setting in which the employees work also changes, even though the employer or business enterprise may otherwise fall within the "classical" definition of successor, the question under the statute is whether the character and structure of the work group employed by that business enterprise has remained unchanged.

The extensive Board and at times Court preoccupation with the identity and continuity of the new or changed business enterprise—i.e., the employing industry, in our judgment places the emphasis on the wrong area under the statutory scheme. The critical inquiry should not be whether there is substantial continuity of the identity of the business enterprise but rather whether there is such continuity of character and structure of the working group as it relates to the environmental framework of collective bargaining. It is not the identity of the employer that should reach out for all of our attention but also the identity and nature of the work group.[3]

A case that illustrates this point well is now pending before this Court on a petition for certiorari. *Ranch-Way, Inc.* 183 *NLRB* No. 116 74 LRRM 1389 (1970) aff'd (CA 10) 445 F.2d 625 (1971) (Docket No. 71-589). The Trial Examiner had originally dismissed the complaint *inter alia*, because the record was not clear whether the employees "may or may not have had a chance to express their sentiments about a Union on a single plant basis . . ." supra, 74 LRRM 1391.[4] The Board reversed him and in its decision totally ignored this factor which

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[3] An excellant example of the proper focus is seen in *Thomas Cadillac, Inc.*, 170 NLRB No. 92, 67 LRRM 1504 (1968) aff'd. as modified (CA DC) 414 F.2d 1135 (1969).

[4] The Ranch-Way case involved the severance of a single small feed mill with a work group of some 25-30 employees from a larger eleven facility enterprise with a single collective bargaining agreement covering some 800 employees. The severance arose because the former owners decided to discontinue the feed mill but local interests stepped in and purchased it.

is the very embodiment of the statutory freedom of choice expressed in Section 7 of the Act.

We submit that the trial examiner in *Ranch-Way* applied the correct test in cases of this kind. By focusing upon the impact the change of ownership had on the work group as altered, he gave due recognition to the Board's proper function under Section 9 of the Act.[5] The Board on the other hand customarily ignored such impact and applied a simplistic approach that does not properly consider the scheme of the Act.

In our view the crucial inquiry should be expressed in two parts:

(1) What change, if any, has occurred in the character and structure of the work group as a result of the change in ownership in the business?

(2) What are the desires of the employees in that work group, as altered, with regard to union representation?

This is not to suggest however that the composition of the work group is the controlling factor but rather to emphasize that it is the structure of that group, as it relates to the environment of collective bargaining, that should be accorded substantially greater importance by the Board than at present.[6]

In many such instances, the new work group is a stranger to the certification and the election upon which it was based. *NLRB* v. *Stepp's Friendly Ford* (CA 9)

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[5] Of course no one, let alone the Board, knows for certain the desires of the employees as to representation in the *altered* group. It is not outside the realm of possibility that if there was originally an eleven facility group vote, the other mills provided a substantial amount of the Union's strength. The point is that the employees in the work group as newly constituted were not accorded freedom of choice as to *their* desires on the question of union representation.

[6] For pre-Burns cases where the Board did give proper consideration see *Northwest Galvanizing Co.* 168 NLRB 26 (1967) *Tallakson Ford, Inc.* 171 NLRB No. 67, 68 LRRM 1136 (1968) *Ellary Lace Corp.* 178 NLRB No. 11, 72 LRRM 1063 (1969).

338 F.2d 833 (1964). Where a portion of a larger group that was certified is severed by a *bona fide* change of ownership, the new work group stands as a different entity separate and apart from the original work one. It is precisely at that point in time when a basic structural change has occurred in the identity of the work group, that it is improper for the Labor Board to impress the employees with continued representation of a labor organization selected at another time and under different foreseeable bargaining circumstances.

We urge the Court to take the opportunity afforded by this case to spell out definitive guideposts enabling the Board, the Courts of Appeal and potential litigants, to make informed judgments on the issues posed. Such a decision here can only have a beneficial effect in reducing the uncertainty which now exists and serve to clarify an important aspect of the national labor policy.

2. The character and structure of the work group was substantially altered as a result of the change from Wackenhut to Burns.

Applying what we consider to be the proper indicia, the Board's finding in this case totally ignored the fact that in changing guard service employers, there had also occurred a change in the character and structure of the work group.

The Wackenhut guards were employed in a group limited to the Lockheed facility and a *separate* labor contract for only that facility was negotiated by Wackenhut with the United Plant Guard Workers of America. Burns, prior to becoming the successful bidder at Lockheed had a labor agreement with a rival guard union, the American Federation of Guards, covering all of the other service contracts which they had throughout Los Angeles County, including the sub-Ontario region.

And while it is true that Burns obviously "followed" Wackenhut in that it supplanted the latter in providing

guard service to Lockheed, the employees involved found themselves faced with being put into a different work group structure and Burns was not, in fact their successor employer.

In *Tri-State Maintenance Corp.* v. *NLRB* 408 F.2d 171 (1968), a case remarkably similar on the facts, involving a change of contractors under a government bidding procedure, not unlike that used by Lockheed, a District of Columbia Circuit panel of Judges Tamm, Burger and Wright, after noting the impact of such change on the character and structure of the work group, concluded:

> "Here, Tri-State had no privity of contract with Frugal or Frugal's employees and it was not a 'successor employer' that bought out the business of another. *John Wiley & Sons* v. *Livingston*" (citation & other cases cited omitted) supra at 408 F.2d 173.

The Court upheld the Board finding that the new contractor was not obligated to bargain with the union and the elementary fact that the right to represent employees is not a permanent relationship which should continue without regard to changing conditions.

Yet the Board, without pausing to consider the desires of the Burns' group, let alone affording them an opportunity to exercise their statutory "freedom of choice". *J. I. Case* v. *Labor Board* supra, turned around and impressed them all under the Wackenhut contract which had been in existence for only a few months and had over 2½ years to run.

The Board, playing the "numbers game", took the position that since the new work group contained 27 former Wackenhut guards and only 15 Burns guards,[7] the majority desired to be represented by the United Plant Guard Workers of America and to have the previous Wackenhut

[7] This, of course, assumes that merely because all of the Wackenhut employees were union members under a compulsory union security clause, they desired continued union representation or even such representation by the U.P.G.W.A.

contract govern their terms and conditions of employment.

The logic, let alone the mathematics of the Board's approach, is not grounded upon a faithful adherence to the spirit of the National Labor Relations Act. Rather it appears to be designed to sublimate such spirit in favor of institutionalizing the interests of one of the two competing labor organizations. The obvious course open to the Board and the easiest one is not acknowledged in its decision, namely a secret ballot election to allow the persons most vitally affected to determine their own destiny.[8]

What is equally disturbing is that the Board has handed down a number of post-Burns decisions which contain situations parallel, if not similar, and are difficult to reconcile. Thus in *Travelodge Corp.* 182 NLRB No. 52, 74 LRRM 1105 (1970) decided simultaneously with *Burns*, the Board gave recognition to the indicia urged here and held (although not in the same language we express herein) that the "degree of continuity in the employing enterprise" was such as to relieve the company of the bargaining obligation under the Act. Yet a reading of the Board's decision reveals great weight accorded to factors ignored in *Burns*.

Likewise in *Lincoln Private Police* 189 NLRB No. 103, 76 LRRM 1727 (1971) the Board concluded that a "totality of the circumstances" persuaded them that the company was relieved of its obligation to recognize and bargain with the Union. We submit that *Lincoln* on the facts is *Burns* in reverse and that the considerations asserted to justify the Board's conclusion there equally buttress the company's position here.[9]

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[8] With the relatively speedy election processes available in light of the 1961 delegation to the Regional Directors, it could seem far more desirable for an election to be held thus, in many instances, avoiding lengthy and costly litigation.

[9] Unlike Burns, the Board in Lincoln extensively discussed the impact of the change of ownership on the character and structure of the work group.

Finally, in a decision issued on December 8, 1971, *Triangle Maintenance Corp.* 194 NLRB No. 85, 78 LRRM 1696, the Board had no difficulty finding that the employer not a successor even though it didn't hire any of the predecessor's employees but had indicated a willingness to do so, albeit at lower wage rates.

C. Even assuming, arguendo, that Burns was a successor, it should not have its predecessor's labor agreement unwillingly imposed upon it.

1. The statute does not confer authority upon the Board to compel the making of labor agreements.

This case in at least one aspect presents another variation of a theme that was rejected less than two (2) years ago by a substantial majority of the present Court —the National Labor Relation Board's continuing attempts to oversee and interdict in substantive collective bargaining.

Looking back over a period of almost thirty-five (35) years this Court has consistently recognized the fundamental policy of freedom of contract by stating on several occasions that the National Labor Relations Act cannot be utilized, even by indirection, to compel a party to agree to a substantive provision of a collective bargaining agreement. In the basic case upholding the constitutionality of the Act this Court stated:

> "*The Act does not compel agreement between employers and employees.* It does not compel any agreement whatever . . . The theory of the Act is that free opportunity for negotiations with accredited representatives of employees *is likely* to promote industrial peace and *may* bring about the adjustments and agreements, which the Act in itself does not attempt to compel." (emphasis supplied) NLRB v. Jones and Laughlin Steel Corp., 301 US 1 45 (1937).

In 1947 Congress felt it necessary to amend the Act because of the Board's attempts to enlarge its authority. The House Committee report specifically referred to the above language from the Court's opinion and said:

> Unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements.[10]

Acting upon this concern as reflected in the Committee's Report, Congress amended the Act to include the present Section 8 (d)[11] and defined the bargaining obligation adding a cautionary note however:

> ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." [12]

In discussing the effect of 8 (d) the Court said in *NLRB* v. *American National Insurance Co.*, 343 US 395, 404 (1952):

> "And it is equally clear that the Board may not, either directly or indirectly, compel concessions *or otherwise sit in judgment upon the substantive terms of collective* bargaining agreements." (emphasis supplied)

Recognition of the limitations upon the Board's power in relation to labor agreements was noted in *NLRB* v. *Strong* 393 US 357, at p. 360 (1969) where the Court admitted that the Board had no plenary authority to ad-

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[10] H.R. Rep. No. 245, 80th Cong., 1st Session 19-20 (1947).

[11] "The requirements provided by Congress in Section 8 of the Taft-Hartley amendments, that the parties confer in good faith, were almost identical to the requirements propounded by the Supreme Court in *NLRB* v. *Jones & Laughlin Steel Corp.*" *The Developing Labor Law*, supra at p.275.

[12] 29 U.S.C. § 158 (d).

minister or enforce such agreements. But Justice White, speaking for the majority, went a step further in granting enforcement to the Board's order compelling the employer to adhere to the terms of the collective bargaining agreement, by pointing out that the case did not involve the Board "trespassing on forbidden territory" by its inquiry into whether or not a bargain between the parties had in fact been reached which one side was refusing to honor.[13]

In 1970 however, the Court was presented with a clear case of such transgression by the Board in *H. K. Porter Co., Inc.* v. *National Labor Relations Board* 397 US 99 (1970). All of the participating Justices agreed on the proper and fundamental interpretation of the Board's statutory authority as set forth by Justice Black: [14]

> "The Board's remedial powers under paragraph 10 of the Act are broad but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." Supra at p. 108:

The Board's order was denied enforcement and the parties returned to the bargaining table in accord with

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[13] Even the case relied upon by the Court in *Strong* conceded that an employer under the Act, retained the freedom to refuse to make an agreement related to its terms in matters of substance. Supra at 393 US p. 361 citing *H.J. Heinz Co.* v. *Labor Board*, 311 US 514, 524-26 (1940).

[14] Even in dissent Justice Douglas speaking for himself and Justice Stewart agreed that "the Court correctly describes the general design and main thrust of the Act".

the spirit of the statute.[15] Such action by this Court clearly was within the intendment of the federal labor policy decreed by Congress under the Act which was not designed in Justice Jackson's view, to "understake governmental regulation of wages, hours or working conditions", but instead to provide the means by which agreement may be reached with respect to them. *Terminal Assn.* v. *Trainmen* 318 US 1, 6. (1942)

In only its last term this Court acknowledged the "strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements. *Chicago and Northwestern Ry. Co.* v. *United Transportation Union* 402 US 570 579, n.11

Nor would the history of this Court on the subject be complete without reference to the very recent and critical decision (in the view of this amicus), in *Norfolk and Western Ry. Co.* v. *Neimitz* —— US ——, 78 LRRM 2721 issued on November 15, 1971. That case involved the statutory authority of the Interstate Commerce Commission to order the consolidated survivor of a railroad merger to accept and abide by the terms of a labor agreement negotiated by one of the two predecessor railroads.

The dispute centered mainly around the interpretation of Section 5 (2) (f) of the Interstate Commerce Act and whether or not it conferred authority upon the Commission to upset a negotiated agreement between an employer and a union under the Act and to *impose* upon them terms which the Commission believed more appropriate to protect the interests of the employees affected by the merger. The Court dividing 4-3 held that Congress in enacting Sections 5 (f) (2) had evidenced its

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[15] The extent of the *Porter* holding was subsequently acknowledged by the Board in *Ex-Cell-o Corp.* 185 NLRB No. 20, 74 LRRM 1740, 1743 (1970) "But it was never intended, the Court held, that the government in such cases step in and become a party to the negotiations."

intention to permit the Commission to exercise plenary authority of such magnitude.

The significance of the majority holding is obvious to the instant case. The National Labor Relations Board seeks to exercise similar power but in the absence of a Congressional mandate as exists in the Interstate Commerce Act. In turning to the Court for such power, the Board has come to the wrong forum. What it seeks is not to be found here but in the halls of the Congress.

Even the dissenters in *Norfolk & Western* speaking through Justice Blackmun furnish support for the employer's position on the imposition of the Wackenhut contract here for the Justices argued that certain language in Section 5 (2) (f) was intended to suspend the Commission's power in those instances where the parties *voluntarily* arrived at a protective agreement thus reaffirming the "strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements". Supra at p. —. Thus, *Norfolk & Western*, on either the majority or minority theories, mitigate against the Board's position here on imposing the labor agreement on an unwilling successor.

The Board however, in the face of the foregoing legislative and judicial genealogy now comes before this Court seeking clear authority to "sit in judgment upon the substantive terms of collective bargaining agreements." It claims that the Act requires the imposition of a collective bargaining agreement upon an unwilling party who was not involved in the negotiation of that agreement. Such an interpretation ignores the long line of legislative enactments and judicial authority as well as the fundamental principle reaffirmed by this Court less than twenty-two (22) months ago, "that the National Labor Relations Act is grounded on the premise of freedom of contract," *H. K. Porter* v. *NLRB*, Supra at 397 US ——. In short, the Board's position finds no support in the Act, the case law or the National labor policy.

2. *The Board's Own genealogy is inconsistent with its view of the statute here.*

The Board's current view is that requiring a successor to honor such a contract is necessary in order "to promote industrial peace." The existence of any such alleged necessity, however, is rendered highly dubious by the nature of the Board's own considerable history of dealing with this problem.

The duty of a successor employer to honor the predecessor's unexpired collective bargaining agreement has been a subject of Board litigation for over twenty-five (25) years. Since at least 1949, and until the instant case, the Board had held that no such duty existed. See *Juneau Spruce Corp.*, 82 NLRB 650, 659 (1949); *Jolly Giant Lumber Co.*, 114 NLRB 413, 414 (1955); *General Extrusion Co.*, 121 NLRB 1165 (1958); *Rohlik, Inc.*, 145 NLRB 1236, 1242 (1964); *Triumph Sales, Inc.*, 154 NLRB 916 (1965).

This holding survived at least three (3) presidential tenures and numerous shifts in Board personnel. The purpose of the Act had been, throughout this period, no different than it is now and the need to ensure "industrial peace" was no less a motivating force behind administrative decisions than it is today.

Not even this Court's *Wiley* decision in 1964, on which so much reliance is now placed, was thought by the Board to suggest the need to guarantee "industrial stability" by requiring successor employers to honor contracts not of their making or liking. Thus, in a series of cases arising between 1964 and 1970, the Board steadfastly declined to overrule its previous decisions, declined to question the principles upon which they were premised and refused even to commit itself as to the effect of *Wiley*, if any, on a successor's duty to honor its predecessor's contract. *K. B. & J. Young's Supermarket, Inc.*, 157 NLRB 271 (1966); *Glen Goulding d/b/a Fed-Mart*, 165 NLRB 202 (1967); *Hackney Iron & Steel Co.*, 167 NLRB 613

(1967); *Michaud Bus Lines, Inc.*, 171 NLRB No. 21 68 LRRM 1033 (1968).

Under these circumstances the Board invites skepticism of its now asserted conclusions that the Act, even in light of *Wiley*, compels a successor to adopt the entire contract of its predecessor and that absent such an adoption there will be a loss of "industrial peace." Apart from the consideration that no evidence, as opposed to speculation, has been advanced to demonstrate that the Board's former views led to industrial hostility or upheard over twenty-five (25) years of experience, logic dictates that no such fears are warranted. A successor which takes over a successful enterprise is hardly likely to invite labor discord and disruption; where contractual terms have shown themselves to be profitable to all, there is no reason in economic common-sense to suppose that a successor employer will jeopardize his investment with an effort to enforce less desirable terms on its work force. Where the enterprise is marginal or worse, the interests of industrial stability are advanced by permitting the successor employer the flexibility to make such changes as will allow the business to revive and gain new strength which as a direct consequence, will allow the employees to achieve a greater measure of job security.

3. *The Court's decision in the Wiley case does not support the Board's position here.*

The Board's attempt to find support for its position in the Court's decision in *John Wiley and Sons* v. *Livingston*, supra, is based upon faulty legal analysis and a gross overstatement of the decision.[16]

As the court well knows, *Wiley* involved the obligation of the surviving company in a statutory merger to arbi-

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[16] The correct holding of *Wiley* is set forth in *Printing Pressman* v. *Pride Papers Corp.* (CA. 2) 445 F.2d 361 (1971) cert. den'd —— US ——, Dec. 20, 1971: "The only obligations that have been imposed by the Courts on successor employers are the obligations to arbitrate". at 445 F.2d 364, citing *Wiley*.

trate "vested" claims under a collective bargaining agreement to which the merged Company was a party.[17] Thus the holding in *Wiley* was entirely retrospective and dealt only with rights which the Court described as "accrued" or "vested" under a pre-existing contract. The Court simply decided that the arbitration clause had survived the merger for the purpose of resolving the disputes over the "vested" rights which arose prior thereto.

Such a holding is a far cry from the Board's attempt to apply the entire contract *prospectively* to the successor employer who had no part in negotiating it. The Board's reliance on *Wiley* is not only unwarranted but also ignores the Court's admonition in the opinion:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." Supra at 376 US ——.

The Labor Board throughout its brief relies heavily on *Wiley*. We submit that in so doing they have overstated the Court's holding which on the narrow situation presented there, does not appear unreasonable in view of the retrospective nature of the setting.

But the Court in *Wiley* did not consider the basic question of what constitutes a "successor", within the meaning of the National Labor Relations Act much less the question of what obligations would flow from the successor relationship when and if it existed. Under these circumstances, the Board's adoption of a general rule prospectively imposing a collective bargaining agreement upon an unwilling successor cannot be said to find any real support in *Wiley*.

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[17] The form of the merger should not be overlooked, for under most state corporation laws the surviving company is required as a matter of law, with or without its consent, to assume the outstanding obligations of *both* precedessor concerns prior to their consolidation. Thus in *Wiley*, the Court referred to Section 90 of the N. Y. Stock corporation law which contained just such an express provision.

Thus, this Court, in effect, approaches this particular matter for the first time and must chart a course consistent with both the letter and the spirit of the statute as enacted by the Congress.

4. ***The desirable approach, and as Congress intended, is to permit the Union and a successor employer freedom to negotiate their own collective bargaining agreement.***

The Board's position represents an unparalleled intrusion into the internal operations of private business. The Board seeks nothing less than the authority to dictate without regard to the conditions existing at the time of a sale or change of ownership and the effect upon the character and structure of the work group, that the successor employer, and in many cases the employees, shall have impressed upon it an alien collective bargaining agreement and be told to attempt to conduct the business irrespective of the consequences. Under such circumstances the forced assumption of the agreement makes no sense. As Board Member Jenkins observed in his dissent in *Burns*:

> "Where the enterprise is marginal or fettering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive." *Burns International Detective Agency*, 182 NLRB No. 50, 74 LRRM 1098, 1101.

As stated earlier, this case involves not only the national labor policy, but the national economic policy as well. If this Court holds that the institutional interests of business must yield to require Burns to recognize and bargain with the Union, so too must the institutional interests of the Union yield to permit the employer to maintain a degree of responsibility and control over the operations, as Burns would conduct them.

In essence, the employer, under the circumstances existing here, is being deprived of a substantial measure

of control and told to operate within the framework of a structure which he had no part in framing. Such a result bears no favorable consequences for those engaged in the struggle for business survival.

The facts of the present case graphically demonstrate this is undesirable. With guard service provided to Lockhead on a one year contract basis, the Board's position is to allow the three-year labor agreement entered into by Wackenhut and the Union to be binding, not only on Wackenhut, but also on the successive independent compaines, if they change yearly. Theoretically this permits Wackenhut and the Union to dictate the business operations of other independent companies, all of whom may be direct competitors of Wackenhut. In a "service industry" such as the providing of plant protection service, generally the only variable in which productivity of efficiency gains can be made is labor. Thus in a very real sense, the contract negotiated by Wackenhut (a scant two months before the contract came up for bid) would not only dictate the business operations of its competitors, but would also prevent those competitors from instituting changes in efficiency which they deemed desirable.

The Board's attempted palliative to the effect that it will consider "unusual circumstances," *Emerald Maintenance, Inc.*, 188 NLRB No. 139, 76 LRRM 1437 (1971), simply creates additional problems. First, because every case will be litigated to the Board and Courts on the basis of "unusual circumstances." Second, because the exception removes all of the purported "benefits" in terms of certainty which the Board credits to the rule.[18] Finally,

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[18] The Board argues in its brief that "there are advantages to a prospective purchaser in knowing that he has a stable labor relationship when he takes over the work (Board Brief p. 32). This is not a realistic statement to any informed observer of the labor relations scene. The existence of a collective bargaining agreement is not, *ipso facto*, a guarantee of either labor stability or even labor peace. See *Boy's Market* v. *Retail Clerks Union Local 770* 398 US

as the Court below recognized, this "merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties."

The Board alludes in *Burns* to a non-existent safety valve for the successor employer when it contends he can make "adjustments" for problems under the labor contract in his negotiations for the acquisition of the business. While this may be true as to those visible economic areas such as accrued vacation pay, etc. it does not follow for many areas that are not expressed in such direct economic terms.[19]

Of interest is that the Board makes no reference to the climate for adjustments by the Union at the time of the change of ownership probably because the Board recognizes that their general attitude may be one of inflexibility and lack of concern for "management's problems".

We believe that Board Member Jenkins in his dissent in *Burns* correctly and accurately stated the amalgam of both the national labor and economic policies,

> ". . . our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the Union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation (sic) may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope." Supra at 74 LRRM 1102.

235, (1970). Further it may be the *fixed* nature of the labor agreement that has driven the employer to the point at which he sells out or seeks merger. See *Lincoln Private Police*, supra.

[19] For example, a highly restrictive clause against obtaining expensive tools and dies from less costly outside sources is totally incapable of "adjustment" during the acquisition talks.

The practical difficulty with the Board's position is best illustrated by its decision in *Interstate 65 Corp.* 186 NLRB No. 41 75 LRRM 1403 (1970) where it saddled the foreclosing creditor of a failing motel operation with a union contract in the face of efforts to save the business by a drastic change in the type of service to be offered to potential patrons.[20]

Speculating that the foreclosing party *may* have made some adjustments (although admittedly the record was barren of any evidence thereof) the Board effectively precluded any relief being obtained under the labor agreement to assist in the rehabilitation efforts that would not only contribute to saving the business but the jobs of some 60 employees as well.

Employers must be accorded a certain degree of flexibility to conduct their businesses and enable them to cope with the exigencies of the marketplace. After all, a stable and secure employer is the best insurance against job insecurity for both the employees and any chosen collective bargaining representative.

In *Emerald Maintenance*, supra, the Board confirmed the the true rationale for its Burns holding was to provide "continuity of employment and stability of employment terms to both employees and employers in enterprises undergoing ownership changes." Not only is such an objective beyond the pale of the agency's responsibility as delegated by Congress but it is a misguided attempt to petrify a prior existing relationship at the very moment when various economic forces have brought about the necessity for a change. It is not the function of the Labor Board, as created by Congress, to sit as an economic czar using its powers to apply its own brand of

[20] The Board requirement that the creditor-owner bargain with the union as the representative of the employees was correct under the rule suggested elsewhere in this brief since there was no real change in the character or structure of the work group because of the change of ownership.

industrial and economic justice and it should be so advised by this Court.

III. CONCLUSION

For the foregoing reasons the decision of the Court below should be affirmed as to its finding that the Wackenhut labor agreement was not binding upon Burns and reversed as to the order of the Board holding the latter guilty of a refusal to bargain in violation of Section 8(a)(5) for not recognizing and bargaining with the United Plant Guard Workers of America.

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